88-72
No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT CO.,
Petitioner,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

LITTON INDUSTRIES, INC., *et al.*,
Petitioners,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, as the court of appeals held (in conflict with the District of Columbia Circuit's decision in the criminal case against respondents for the same conduct), the participants in a conspiracy to eliminate direct competitors are immune from antitrust accountability in the federal courts because they are regulated by a federal administrative agency.

2. Whether *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), which bars certain antitrust damage actions by shippers, should be extended for the first time, as the court of appeals held (in conflict with the decisions of three other courts of appeals), to bar antitrust claims by competitors.

3. Whether the court of appeals exceeded its prescribed jurisdiction (a) by permitting respondents to challenge the standing of a plaintiff for the first time on interlocutory appeal under 28 U.S.C. 1292(b) (in conflict with this Court's decision in *United States v. Stanley*, 107 S. Ct. 3054 (1987)), and (b) by ignoring the applicable abuse of discretion standard for reviewing an interlocutory order denying summary judgment, substituting itself as factfinder, and, on the basis of an incomplete record, drawing its own conclusion that summary judgment is warranted.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Litton Systems, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc. are petitioners, and Bessemer & Lake Erie Railroad Company, Chesapeake & Ohio Railway Company, Baltimore & Ohio Railroad Company, Chessie System, Inc., and CSX Corporation are respondents.*

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* The Penn Central Corporation was dismissed as a defendant in the district court and was not a party to the interlocutory appeal before the Sixth Circuit. Pursuant to Fed. R. App. P. 42(b), the Chesapeake & Ohio Railway Company, Baltimore & Ohio Railroad Company, and CSX Corporation were dismissed from the appeal in the *Pinney* case on June 5, 1985 (*see* Pet. App. 3a n.1).

Pursuant to Supreme Court Rule 28.1, petitioners state the following: Petitioner Pinney Dock & Transport Company is owned in part by the Standard Slag Corporation. Petitioners Litton Systems, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc. are wholly-owned subsidiaries of Petitioner Litton Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-76a) is reported at 838 F.2d 1445. The opinions of the district court in the *Pinney* case (Pet. App. 81a-129a, 131a-200a, 201a-242a) are reported at 600 F. Supp. 859, 600 F. Supp. 886, and 1983-2 Trade Cas. (CCH) ¶ 65,608. The opinions of the district court in the *Litton* case (Pet. App. 257a-310a, 311a-13a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1988 (Pet. App. 77a-78a). The petition for rehearing was denied on April 13, 1988 (Pet. App. 79a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2; Section 5(a) of the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, 62 Stat. 472 (1948) (formerly codified at 49 U.S.C. (1976 ed.) 5b and currently codified at 49 U.S.C. 10706); Sections 3, 4, and 4B of the Clayton Act, 15 U.S.C. 14, 15, and 15b; 28 U.S.C. 1292(b); and Fed. R. Civ. P. 56(c) are reprinted at Pet. App. 323a-26a.

STATEMENT OF THE CASE

This case involves a longstanding conspiracy to eliminate direct competitors and to monopolize the transportation and handling of iron ore on the Great Lakes. So ruthlessly predatory was the conspiracy that the United States brought a criminal antitrust prosecution against respondents on the same facts (*see* Pet. App. 216a). Yet, the court below held, in conflict with the decision of the District of Columbia Circuit in the criminal case, that respondents' conspiratorial acts are immune from antitrust scrutiny.

1. Historically, iron ore was transported across the Great Lakes in vessels ("bulkers") that could be unloaded only by large onshore cranes ("huletts"). The respondent railroads owned the only docks equipped with huletts and thus controlled all docking services for iron ore. By the 1950's, respondents were threatened with competition for the first time as technological advances enabled iron ore to be shipped in "self-unloader" vessels, so named because a conveyor system in the vessel performed the task of unloading ore at the dock. Bulker

vessels were no longer economical, and docks equipped with huletts were no longer necessary for unloading iron ore. *See* Pet. App. 8a-9a, 82a-84a; C.A. App. 77-78, 91-92.

Respondents conspired to eliminate and delay, for as long as possible, the competition this technological advance portended for railroad-owned docks. Respondents conspired to preserve their monopoly in several ways, including (Pet. App. 9a-11a, 83a-84a; C.A. App. 78-83, 92-98):

a. Respondents agreed to eliminate the economic advantages self-unloaders would have enjoyed in head-to-head competition with bulkers. Some respondents sought to accomplish this objective by refusing to allow self-unloaders to dock at railroad-owned facilities; other respondents sought to accomplish the same objective by assessing—with no written proposal or filing with the Interstate Commerce Commission—the same handling charges for self-unloaders and bulkers, even though substantially less service was performed.

b. Respondents agreed to boycott non-railroad docks such as petitioner Pinney Dock and Transport Company ("Pinney") since respondents could not dictate the handling charges set by these docks. The boycott included acts by respondents to preclude non-railroad docks from competing with railroad docks in handling iron ore by refusing to make comparable rail services available to non-railroad docks.

c. Respondents agreed to block competition from non-railroad firms by refusing to sell or lease dock space to such firms, including petitioner Litton Industries, Inc. ("Litton").

d. Respondents agreed to impede any effort to transport iron ore by truck from non-railroad docks, eliminating the only cost effective alternative to respondents' transportation of iron ore to steel mills. Pursuant to this agreement, respondents harassed trucks that attempted to move ore from non-railroad docks, including petitioner Pinney.

e. Respondents agreed not to exercise their right of independent action, preservation of which is a condition precedent to any antitrust immunity, and used coercion and threats of retaliation against any co-conspirator that proposed to act independently.

f. Respondents agreed to conceal and not to publicize these agreements, and affirmatively misled petitioners and others concerning their motives and actions.

Although respondents were members of an approved rate bureau, the conspiracy challenged in this litigation is wholly separate from rate bureau activites (218a-20a), and the acts in furtherance of the conspiracy were taken during the course of secret, unpublicized meetings outside the auspices of the railroads' tariff bureau (139a-47a, 262a-65a). In short, the complaints in these cases allege that respondents went far beyond the limited joint conduct authorized by the Interstate Commerce Act and instead sought unlawfully to preserve their monopoly by blocking competition from alternative modes of transportation, including petitioners.

Petitioner Pinney is a dock company in Ashtabula Harbor, Ohio. It is neither owned by nor affiliated with a railroad. Because Pinney is ideally suited for servicing self-unloader vessels (since its dock is not encumbered by huletts), it was a principal target of respondents' conspiracy. Respondents took direct action against Pinney, including boycott, spying and sabotage. Respondents sought to eliminate competition from Pinney both by thwarting the development of self-unloader vessels that could utilize Pinney's services and by effectively eliminating rail and truck transportation from Pinney. In short, respondents combined to neutralize Pinney's substantial economic advantages in the receipt, handling and transshipment of iron ore. *See* Pet. App. 82a-84a, 219a-20a.

The Litton petitioners were principally engaged in the manufacture and operation of self-unloading vessels. Because the advent of self-unloaders threatened respondents' monopoly, respondents acted to eliminate Litton's entry into this business: respondents refused to handle self-unloaders at their own docks; refused to sell or lease dock space to Litton; interfered with Litton's efforts to develop a dock facility; and raised

spurious challenges to Litton's efforts to bypass respondents' docks. Litton was forced out of business after constructing only two vessels. *See* C.A. App. 78-80, 93; Pet. App. 82a-84a, 257a-58a, 301a-10a.

2. Shortly after learning of respondents' conspiracy, petitioners Pinney and Litton each filed an antitrust action in the United States District Court for the Northern District of Ohio.[1] The complaints alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, as well as several state law claims under Ohio's Valentine Act. The complaints sought damages and injunctive and declaratory relief. *See* C.A. App. 82, 85, 97, 99-100.

Respondents moved to dismiss the complaints on numerous grounds, contending that because respondents' activities were subject to regulation by the ICC, their conduct was immunized from the antitrust laws; that petitioners' claims for damages were barred by *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); that petitioners' claims were barred by the statute of limitations; and that petitioner Pinney lacked standing.[2]

In a series of opinions entered in 1983 and 1984, the district court carefully examined and rejected respondents' contentions. The district court correctly perceived that respondents' arguments depended upon mischaracterizing petitioners' claims as a "simple ICC rate case" (Pet. App. 120a). The court recognized (*ibid.*) that respondents' mistaken description

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[1] Respondents were later indicted for the same conduct in a criminal antitrust proceeding in the District of Columbia. After all respondents' jurisdictional defenses and immunity claims were rejected, four respondents were convicted on pleas of *nolo contendere* and one respondent was acquitted at trial. *See United States v. Baltimore & O.R.R.*, 538 F. Supp. 200 (D.D.C. 1982), *aff'd sub nom. United States v. Bessemer & L.E.R.R.*, 717 F.2d 593, 601 (D.C. Cir. 1983).

Additional civil lawsuits against respondents for the same conduct are currently pending in consolidated pretrial proceedings in the Eastern District of Pennsylvania. *In re Lower Lake Erie Iron Ore Antitrust Litigation*, M.D.L. No. 587 (E.D. Pa.).

[2] Respondents did not challenge Litton's standing in the district court (*see* Pet. App. 29a).

"misses the heart of plaintiff[s'] claim" because respondents fail to acknowledge that the alleged conspiracy "falls outside the bounds of day-to-day railroad rate making." Rather, as the court stated, "[t]he issue is whether [respondents] illegally conspired to boycott and eliminate a direct competitor so as to monopolize a market" (*id.* at 91a). Based on that accurate understanding of the case, the court held (*id.* at 113a):

> [A] conspiracy to eliminate a competitor cannot fall within [the Interstate Commerce Act's] limited grant of express antitrust immunity, [and thus] plaintiff is entitled to prove its allegations that the defendants conspired to eliminate it as a competitor in order to monopolize the business of providing dock services for the unloading of ex-lake iron ore.

The district court also rejected respondents' contention that petitioners' claims for damages are barred by *Keogh*. *See* Pet. App. 113a-21a, 211a-15a, 244a. In *Keogh*, this Court held that "a private shipper, [could not] recover damages under [the antitrust laws] because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed." 260 U.S. at 162. Consistently with every court that has considered whether *Keogh's* bar against antitrust damage claims by shippers also precludes claims by competitors, the district court concluded that *Keogh* was inapposite here because petitioners do not seek "to recover an alleged discriminatory overcharge," but rather to recover for lost business they "suffered as a direct competitor of [respondents]" (Pet. App. 114a).

In assessing Pinney's standing to challenge respondents' conspiracy, the district court weighed the factors prescribed in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*") and concluded that all of the *AGC* factors were satisfied: Pinney was "the direct target of [respondents'] alleged antitrust violations; [respondents'] alleged antitrust activities had as their ostensible purpose directly injuring [petitioner's] ability to compete in the unloading of ex-lake iron ore" (Pet. App. 123a); "the chain of causation between [petitioner's] alleged injury and [respondents'] alleged antitrust violations is directly linked" (*ibid.*); and "[petitioner's] damages claims are sufficiently tangible and non-speculative" (*id.* at 124a).

The district court also denied respondents' motions for summary judgment based on the four-year statute of limitations applicable to federal antitrust cases (Pet. App. 131a-78a, 257a-94a). After an exhaustive review of the factual record, the district court found sufficient evidence of fraudulent concealment (*id.* at 139a-55a, 262a-75a), including affirmative acts cloaking the conspiracy in secrecy, to raise genuine issues of material fact which precluded an award of summary judgment. The district court also found sufficient evidence that petitioners were not aware of crucial facts underlying their antitrust claims, and that petitioners were diligent in protecting their rights (*id.* at 156a-77a, 275a-94a).

3. Following the district court's certification under 28 U.S.C. 1292(b), the court of appeals granted leave to appeal in *Pinney* and *Litton* (Pet. App. 255a, 317a-18a) and consolidated the cases for oral argument. Although expressing confusion "whether certain issues were certified for interlocutory appeal," the court of appeals held that "even those issues not properly certified are subject to our discretionary power of review if otherwise necessary to the disposition of the case" (*id.* at 15a; *see id.* at 75a). Based on that statement of its interlocutory appellate jurisdiction, the court of appeals reversed, in whole or part, virtually all of the district court's holdings.

In large part, the court of appeals' analysis of the substantive legal issues was shaped by the court's failure to perceive that the complaints alleged a conspiracy separate and apart from lawful ratemaking activity and sought damages caused by the conspiracy itself. Instead, the court of appeals analyzed the issues as if each overt act alleged in furtherance of the conspiracy was a distinct claim for which damages were sought. Based on this misreading of the complaints and misapprehension of the district court's decisions, the court of appeals proceeded, incorrectly, to direct that summary judgment be entered dismissing each "claim" that could be construed as "rate-related."

The court of appeals inexplicably chose to address first the damages issues based on *Keogh*. The court acknowledged (Pet. App. 21a) that "the anti-discrimination arguments behind the *Keogh* doctrine lose their force in competitor lawsuits such as this," and it noted that the Second and Third Circuits "have

held that *Keogh* does not apply when the plaintiff is in competition with the defendant" (*id.* at 17a). Nonetheless, the court of appeals extended *Keogh* for the first time in its 65-year history to bar claims by competitors. The apparent rationale for this extraordinary step was the court's conclusion that "the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors" (*id.* at 20a).[3]

The court of appeals next turned to respondents' contention that their conspiracy to eliminate a direct competitor is immunized from federal antitrust liability by the Interstate Commerce Act ("ICA"). At times relevant to this case, Section 5a of the ICA, as amended by the Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948), 49 U.S.C. (1976 ed.) 5b (currently codified at 49 U.S.C. § 10706), provided that parties to an ICC-approved rate agreement are "relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and with the terms and conditions prescribed by the [ICC]." The court of appeals rejected the district court's holding that a conspiracy to eliminate a direct competitor falls outside this limited statutory grant of immunity (Pet. App. 23a-25a). Instead of perceiving that the complaints alleged a separate and broader conspiracy, the court of appeals viewed the complaints as challenging only lawful ratemaking activity, based solely on the allegation that such otherwise lawful activity was motivated by an anticompetitive purpose (*id.* at 24a). Having thus misconstrued the import of the cases before it, the court of appeals concluded that despite the predatory purpose and effect of respondents' actions, they continued to enjoy total antitrust immunity. That result is directly contrary to the holding of the District of Columbia Circuit in the related criminal case involving the same respondents and the same underlying activities (*see* note 1, *supra*) and conflicts with decisions of this Court.

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[3] The United States filed an *amicus* brief in support of petitioners' petition for rehearing in the Sixth Circuit. The government's *amicus* brief characterized the court of appeals' holding on *Keogh* as "puzzling and wrong" and stated further that the decision "threatens proper antitrust enforcement by wrongly creating a new immunity from antitrust damage claims [brought by] the railroads' competitors" (Gov't C.A. Am. Br. 1, 3).

On the issue of antitrust standing, the court of appeals splintered respondents' conspiracy into component overt acts, which it regarded as "rate-related." Viewing each overt act in isolation, rather than as a constituent element of the overarching conspiracy, the court held that certain acts were more directly aimed at steel companies who were consumers of rail and dock services than at petitioners and hence that petitioners' injuries were too remote. *See* Pet. App. 32, 35-36, 76.[4] The court of appeals therefore held that petitioners—the very competitors against whom respondents' conspiracy was directed—lacked standing to sue.

With respect to the statute of limitations, the court of appeals ruled that in order to establish "wrongful concealment" under *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975), a plaintiff must prove affirmative acts of concealment. The court of appeals did not reject the district court's conclusions that there was sufficient evidence of affirmative acts of concealment to preclude summary judgment (Pet. App. 64a, 76a); the court of appeals simply disagreed with the district court's statement that a factual dispute existed over petitioners' knowledge of, and due diligence in uncovering, the conspiracy (*id.* at 64a-66a, 70a-71a, 76a). The court of appeals did not state that the district court had abused its discretion in denying summary judgment on this interlocutory record (*id.* at 70a). Instead, the court of appeals assumed the role of a trial court and, after its own cursory review of the evidence (but without having obtained the full record from the district court),[5] resolved the factual disputes and concluded that summary judgment should be granted in favor of respondents.[6]

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[4] The court of appeals acknowledged that respondents had not raised, and the district court did not address, any question of Litton's standing (Pet. App. 29a). The court of appeals reached and disposed of that issue nonetheless.

[5] Pursuant to Rule 11(e), Fed R. App. P., the record was retained in the district court (Pet. App. 319a-21a). The docket sheets in the court of appeals reflect that the Sixth Circuit never obtained the record from the district court.

[6] The court of appeals also held (Pet. App. 71a-76a) that Ohio's Valentine Act, which has no statute of limitations, is not preempted by the federal antitrust laws. Hence, any of petitioners' claims under state law, which survive the other rulings by the court of appeals, are not barred by the federal statute of limitations.

REASONS FOR GRANTING THE PETITION

At every turn, the decision of the court of appeals is at war with established legal principles, standards and procedures. Petitioners seek review on three questions of law on which the court of appeals departed in serious and profound ways from long-settled precedent.

This case presents important and recurring questions concerning immunity from the antitrust laws in regulated industries. The court of appeals has effectively nullified the federal antitrust laws in a critical sector of the nation's economy by conferring a broad immunity upon railroads which conspire to put directly competing modes of transportation out of business. The decision below cannot be reconciled with established law governing the scope of immunity conferred by the Reed-Bulwinkle Act. The court of appeals ignored 40 years of jurisprudence interpreting the Reed-Bulwinkle Act. Further, by taking the unprecedented step of applying *Keogh* to bar damage claims by competitors, the decision below places the Sixth Circuit in conflict with the Second, Third, and Ninth Circuits—a conflict which the court of appeals acknowledged but made no attempt to resolve.

This case also presents jurisdictional and prudential questions that implicate the proper functions of federal appellate courts. In conflict with this Court's decision in *United States v. Stanley,* the Sixth Circuit exceeded its prescribed jurisdiction by considering on interlocutory appeal under 28 U.S.C. 1292(b) an issue (Litton's standing) that was never raised in the district court and was not contained in any order certified by the district court. The court of appeals further exceeded the bounds of proper appellate review by directing the entry of summary judgment on standing and on fraudulent concealment following its own cursory *de novo* review of an interlocutory and incomplete record that, as the district court held, contained disputed issues of material fact that precluded summary judgment. Without stating any controlling question of law or determining which questions the district court had actually certified—essential predicates to jurisdiction under Section 1292(b)—and without concluding that the district court had abused its discretion in any respect, but purely on the basis of

its own evaluation of an incomplete record, the court of appeals incorrectly entered judgment as a matter of law.

This Court should grant review to correct the manifestly erroneous decision of the court of appeals.

1. *Statutory Immunity*

a. This Court has repeatedly rejected the notion that the existence of pervasive regulation, or the availability of an administrative remedy, establishes a congressional intent to deny relief under the antitrust laws.[7] In accordance with the Court's admonition that the judiciary should "not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall, inclusive one" (*California v. FPC*, 369 U.S. 482, 485 (1962)), the established rule is that immunities from the antitrust laws are to be construed narrowly and limited to the scope clearly intended by Congress. *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 126 (1982); *National Gerimedical Hospital & Gerontology Center, Inc. v. Blue Cross*, 452 U.S. 378, 388-89 (1981); *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976).

Even in the particular context of ICC regulation, this Court has held—both prior and subsequent to passage of the Reed-Bulwinkle Act—that the Interstate Commerce Act does not immunize railroads from antitrust liability. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 414 (1986); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 565 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 314-315 (1897).[8]

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[7] *See e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-77 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 224 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 351-52 (1963); *Silver v. NYSE*, 373 U.S. 341, 357 (1963); *California v. FPC*, 369 U.S. 482, 487-90 (1962); *United States v. Borden Co.*, 308 U.S. 188, 195-99, 205-06 (1939).

[8] *See also Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (where there would have been no need to determine whether the Sherman Act barred defendants' conduct if that conduct were immune from antitrust scrutiny); *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958).

This Court recently underscored that ICC regulation does not displace the antitrust laws. *ICC v. American Trucking Ass'n,* 467 U.S. 354, 360 (1984) (*ATA*). In upholding the ICC's authority retroactively to nullify motor carrier tariffs filed in violation of an ICC-approved agreement, this Court stated in *ATA* that "injured parties can recover both damages under [the ICA] *and whatever additional amounts the antitrust laws allow.*" *Ibid.* (emphasis added).

b. In contrast to the broad and absolute immunity the court of appeals conjured up, the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, confers only a strictly limited immunity from the antitrust laws. The Act creates an immunity only to the extent that the parties comply with the rate bureau agreement and with the dictates of the ICC. And the Act [§§ 5a(6),(9)] expressly excludes from the limited grant of immunity conduct that restrains a railroad's right to take independent action. As the district court recognized (Pet. App. 88a-90a n.4)—but the court of appeals ignored—petitioners' complaints allege and the evidentiary record shows that respondents coerced the members of the conspiracy to forgo their statutory right to take independent action. By directing entry of summary judgment in these circumstances, the court of appeals contravened the express language of the Act.

c. The decision below conflicts also with the decision of the District of Columbia Circuit in the related criminal case. The felony indictment and the *Pinney* and *Litton* complaints all alleged the same conduct by respondents. In rejecting respondents' contentions that their conspiratorial activities were immune from liability under the antitrust laws, the District of Columbia Circuit correctly recognized that this is not a "rate" case, that respondents' conspiracy "only incidentally touched upon the setting of rates, its real purpose was to ward off the outside competition heralded by the advent of the self-unloaders." *United States v. Bessemer & L.E.R.R.,* 717 F.2d at 601. It could not be more plain that the Sixth Circuit and the District of Columbia Circuit are in direct conflict on the issue of statutory antitrust immunity. When presented with the same facts (*see* Pet. App. 35a n.17), the District of Columbia Circuit

held that respondents' acts are not immune from antitrust liability and the Sixth Circuit held that they are immune. It cannot be both ways. Respondents' conduct either is immune or it is not.[9]

There is no merit to the Sixth Circuit's suggestion that its holding is not "necessarily at odds" with that of the District of Columbia Circuit because the latter court confronted "entirely different considerations of the role of the United States in the criminal enforcement of the Sherman Act" (Pet. App. 29a n.15). Statutory immunity does not turn on whether the government or a private party is plaintiff, or on whether the proceeding is civil or criminal.[10] A plain and irreconcilable conflict exists and should be resolved by this Court.

d. The Sixth Circuit also misread Congress' intent on the scope of statutory immunity. The opinion below concludes

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[9] Even if the court of appeals were correct in stating that petitioners seek to strip immunity from otherwise lawful conduct solely because that conduct was undertaken with an unlawful purpose, the decision below would still be in conflict with the District of Columbia Circuit's decision in *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877, 887-88 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960). *Aircoach* was central to the analysis of the district court in this case and of the District of Columbia Circuit in the criminal case. The Sixth Circuit, however, ignored *Aircoach*. *See also California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) ("[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme"); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) ("if [lawful acts] are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition"); *Truax v. Corrigan*, 257 U.S. 312, 327 (1921); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

[10] The court of appeals, noting (Pet. App. 28a) that petitioners had "waive[d] claims that [respondents] failed to comply with the rate agreement," relied on that "waiver" in dismissing petitioners' challenge to respondents' anticompetitive conduct. But the court of appeals mischaracterized the record and misconstrued petitioners' "waiver." Petitioners informed the district court only that they would not press claims involving "an interpretation of any technical or peculiar language of [respondents' rate bureau agreement]," but that petitioners would contend "that [respondents] reached and implemented rate agreements without following the very basic public notice procedures set out in the [rate bureau agreement]" (C.A. App. 602).

(Pet. App. 25a-28a) that the Reed-Bulwinkle Act overturned this Court's decision in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). In that case, Georgia alleged that defendant railroads had conspired to fix prices and to discriminate against the State. This Court held that the State could obtain an injunction against the continued existence of the conspiracy.

The ensuing deliberations that led to the passage of the Reed-Bulwinkle Act clearly record Congress' determination to leave intact this Court's decision in *Georgia*. The House Report characterized the allegations in *Georgia* as "involv[ing] activity only in the field of ratemaking," and noted that "passage of the bill will not interfere with th[is] case[], nor prevent the court from making the decree it finds justified by the evidence and the law as it exists without this bill." H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 & n.1 (1948). This theme was echoed repeatedly by the sponsors. *See* 94 Cong. Rec. 8591 (1948) (remarks of Sen. Reed) ("The bill has no relation at all to any case that rests upon conspiracy"); 91 Cong. Rec. 11959 (1945) (remarks of Rep. Bulwinkle) (H.R. 2536, the predecessor to the bill enacted, "would not" bar lawsuits against conspiracies and "has nothing to do with [the *Georgia*] case"); *Rate Bureaus, Conferences and Associations: Hearings on S.110 Before the Senate Comm. on Interstate Commerce,* 80th Cong., 1st Sess. 59 (1947) (remarks of Sen. Reed) (*Georgia* case "is based on conspiracy" and so "this bill would have no real effect on the *Georgia* case"); 91 Cong. Rec. 11935 (1945) (remarks of Rep. Bulwinkle) ("[i]f they follow the agreement which has been submitted to, and which has been approved by, the Interstate Commerce Commission, then they are absolved from any violation of the antitrust law; but if they go beyond that, they are not"); 91 Cong. 11932 (1945) (remarks of Rep. Slaughter) ("this act would not relieve [the railroads] if they went completely outside the policy set up herein and entered into some side agreement or some agreement which was clearly a conspiracy and restraint of trade"); 94 Cong. Reg. 8590 (1948) (remarks of Sen. Reed) (the bill "does not . . . remove the carriers from the general provisions of the antitrust laws. It does not render moot or defeat the pending antitrust suit of the State of Georgia").

In light of these plain and repeated statements of purpose, the court of appeals erred in holding that the Reed-Bulwinkle Act immunizes the railroad conspiracy alleged here. The court also erred in holding (Pet. App. 27a) that the Reed-Bulwinkle Act overturned this Court's decision in *Georgia,* a decision which this Court continues to cite with approval. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 56 U.S.L.W. 4539, 4541 (U.S. June 13, 1988). This Court, therefore, should grant review and should reverse the Sixth Circuit's creation of an expansive immunity not contemplated by Congress or recognized by the courts.

2. *Keogh*

a. The decision below creates a conflict among the circuits on the question whether *Keogh* bars antitrust damage actions by competitors. In *Keogh,* this Court held that a *shipper* could not maintain a private antitrust damage action to challenge railroad rates that were filed with and approved by the ICC. *Keogh* has been invoked often in the past 66 years to bar awards of damages in antitrust cases brought by *shippers. See, e.g., Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409 (1986). But, with the sole exception of the opinion by the Sixth Circuit in this case, no court of appeals has expanded *Keogh* to bar antitrust damage claims by *competitors.* Three courts of appeals have expressly refused to expand *Keogh* as the Sixth Circuit did in this case; those courts held that competitors may pursue antitrust damage claims in circumstances similar to those presented here.

In *City of Groton v. Connecticut Light & Power Co.,* 662 F.2d 921 (2d Cir. 1981), the Second Circuit held that plaintiff competitors who claimed they had been squeezed out of certain markets could seek antitrust damages based on defendant's filing of wholesale electric rates with the Federal Power Commission. The court held that plaintiffs were not barred by *Keogh,* even though the filing of utility rates was a significant component of the alleged antitrust violation. 662 F.2d at 929-31. Similarly, in *Litton Systems, Inc. v. AT&T,* 700 F.2d 785 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073 (1984), the same court held that *Keogh* did not bar an award of damages where plaintiff claimed that one of the methods defendant used to

impair competition was the imposition of an interconnection charge on consumers who used plaintiff's equipment. Although the interconnection charge was contained in a filed tariff, the court held that *Keogh* was inapplicable because "the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged." *Id.* at 820-21. *See also Square D,* 760 F.2d 1347, 1365 (2d Cir. 1985), *aff'd,* 476 U.S. 409 (1986) (allegations that defendants engaged in conduct "to inhibit or eliminate competition" or conduct "that either was not or could not be approved by the ICC" survive *Keogh*).

As the Sixth Circuit recognized, the decision below conflicts also with the Third Circuit's decision in *Essential Communications Systems, Inc. v. AT&T,* 610 F.2d 1114 (3d Cir. 1979). Like *Litton Systems, Essential Communications* was an antitrust suit brought against AT&T challenging its tariff that required the imposition of an extra charge on customers who used plaintiff's telephone equipment. The Third Circuit held that *Keogh* did not preclude antitrust damages in favor of a competitor where a filed tariff implemented a monopolization scheme.

The Ninth Circuit has also rejected the proposition that *Keogh* should be expanded to bar antitrust damage claims by competitors. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.,* 690 F.2d 1240, 1266-67 (9th Cir. 1982), *cert. denied,* 459 U.S. 1227 (1983).

b. There is no merit to the Sixth Circuit's suggestion (Pet. App. 19a-20a n.12) that this Court "appl[ied] *Keogh* to a competitor" in *Georgia v. Pennsylvania R.R.* This Court did nothing of the sort. In seeking leave to file an original action in the Supreme Court, the State of Georgia sued in several capacities, including as the owner of a railroad, *i.e.,* as a competitor of the defendants. But the Court mentioned Georgia's alleged status as a competitor only in the context of assessing the justiciability of the State's claim within this Court's original jurisdiction. Even then, the Court "treat[ed] the injury to the State as proprietor merely as a 'makeweight.'" 324 U.S. at 450. In the portion of its opinion assessing the application of *Keogh,* this Court made no mention of Georgia's

alleged status as proprietor/competitor. And for good reason: Georgia sought no damages in its capacity as a competitor. As the pleadings in *Georgia* show, the only damages the State sought in its "proprietary capacity" were "as a *shipper* of goods and commodities" (No. 11 Orig., 1944 Term, Motion for Leave to File Amended Bill of Complaint; and Amended Bill of Complaint at 25) (emphasis added).[11] When this Court applied *Keogh* to Georgia's claims, it was not, as the Sixth Circuit supposed, barring any damage claims brought by a *competitor.*

c. The Sixth Circuit's expansion of *Keogh* also flies in the face of this Court's decision in *Square D.* In *Square D,* this Court reaffirmed *Keogh's* holding that *shippers* are not entitled to bring a treble-damages antitrust action challenging rates filed with the ICC. The Court did not, however, endorse *Keogh's* rationale. Instead, the Court relied on *stare decisis* and on the fact that *Keogh* had been a fixture on the legislative landscape for more than 60 years. The Court therefore concluded that any change in this settled scene would have to come from Congress. It is wholly inconsistent with the essential premise of *Square D*—preservation of the status quo—for the Sixth Circuit suddenly to preclude antitrust damage claims not only by shippers (as in *Keogh, Georgia,* and *Square D),* but also by *competitors* (who are seeking damages based on lost profits) on the unsupportable premise that "the ICC is the sole source of the rights not only of shippers, but of the entire public including competitors" (Pet. App. 20a). The teaching of *Square D* is that the courts should not depart so abruptly from consistent precedent in an area that has seen "careful, intense, and sustained congressional attention" (476 U.S. at 424).

This Court should grant review and should reverse what the Department of Justice has characterized as a "puzzling and wrong" application of *Keogh* that conflicts with the decisions of

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[11] Georgia explained that its claim for damages as a proprietor (not of a railroad, but of other institutions in the State) was for the increased costs "of certain merchandise and materials which are transported by defendants into this State to be used by the State of Georgia, itself" (No. 11 Orig., 1944 Term, Brief on Behalf of the State of Georgia On Motion to File Amended Bill of Complaint at 27). *See Hawaii v. Standard Oil Co.,* 405 U.S. 251, 259-60 (1972) (recognizing that Georgia brought damage claims as a shipper).

other courts of appeals and that "threatens proper antitrust enforcement" (Gov't C.A. Am. Br. 1, 3).[12]

3. *Appellate Jurisdiction.* The Sixth Circuit erred by exceeding its prescribed jurisdiction under 28 U.S.C. 1292(b).

a. The court of appeals had no jurisdiction to consider petitioner Litton's standing to sue. Respondents never challenged Litton's standing in the district court and the orders certified by the district court under Section 1292(b) do not address Litton's standing.[13] As this Court held in *United States v. Stanley,* 107 S. Ct. at 3060, the court of appeals had "no jurisdiction" to enter an order disposing of respondents' belated attack on Litton's standing. The court of appeals' decision conflicts with this Court's decision in *Stanley* and with "[t]he age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists" (*Christianson v. Colt Industries Operating Corp.,* 56 U.S.L.W. 4625, 4630 (U.S. June 17, 1988)).[14] This manifestly incorrect usurpation of appellate jurisdiction should be reversed.[15]

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[12] The decision below has already had repercussions. In seeking dismissal and summary judgment in the related multidistrict litigation based on the same conduct (*see* note 1, *supra*), respondents have argued that the decision of the Sixth Circuit broadly immunizes anticompetitive conduct from judicial scrutiny. Respondents' motions remain *sub judice* in the M.D.L. cases.

[13] Respondents' application for leave to appeal under 28 U.S.C. 1292(b) also made no mention of Litton's standing.

[14] The Sixth Circuit's stated rationale for reaching the issue of Litton's standing is flatly wrong. The court of appeals relied on *dictum* in *Singleton v. Wulff,* 428 U.S. 106 (1976). But this Court held in *Singleton* that it was "an unacceptable exercise of . . . appellate jurisdiction" for the court of appeals to decide an issue on which a party never had an opportunity to present his evidence in the trial court. In any event, *Singleton* did not involve an appeal under Section 1292(b), where, as the Court confirmed in *Stanley,* statutory requirements and principles of judicial economy dictate a more limited appellate role than exists on appeal from a final judgment.

[15] On the merits, the court of appeals' holding that Litton and Pinney lack standing conflicts with established principles. It is preposterous to say that the direct competitors whom respondents conspired to eliminate have no standing to challenge the conspiracy by which their elimination was to be accomplished. The court also erred by assessing petitioners' standing to challenge individual overt acts taken in furtherance of the conspiracy, rather

(footnote continues)

b. More generally, the court of appeals exceeded its jurisdiction under Section 1292(b) by considering the merits of respondents' defenses on the issues of standing and the federal statute of limitations. Having acknowledged that it is "difficult to determine precisely whether certain issues were certified for interlocutory appeal" (Pet. App. 15a), given "the vagueness of the certification procedure employed both by the district court and by our court" (*id.* at 75a), the Sixth Circuit had no jurisdiction to proceed further. *Christianson v. Colt Industries Operating Corp.*, 56 U.S.L.W. at 4630, quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 449 (1850) (" 'Courts created by statute can have no jurisdiction but such as the statute confers' "). The proper certification of a controlling question of law is a statutory prerequisite to interlocutory appeal under Section 1292(b). *Cf. Van Cauwenberghe v. Biard*, 56 U.S.L.W. 4545, 4549 (U.S. June 13, 1988). Since it could not determine the scope of certification, the court of appeals was not empowered to proceed.

(footnote continued)

than their standing to challenge the conspiracy as a whole. This splintering of a conspiracy into its overt acts is directly contrary to the holdings of this Court, *see Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *United States v. Patten*, 226 U.S. 525, 544 (1913), and to the decisions of at least eight courts of appeals. *See, e.g., Engine Specialties Inc. v. Bombardier Ltd.*, 605 F.2d 1, 16 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *Litton Systems, Inc. v. AT&T*, 700 F.2d at 815-816; *City of Groton v. Connecticut Light & Power*, 662 F.2d at 928-929, 935; *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 95 n.28 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Tunis Brothers Co. v. Ford Motor Co.*, 763 F.2d 1482, 1491 (3d Cir. 1985), *vacated and remanded on other grounds*, 475 U.S. 1105 (1986), *reaff'd*, 823 F.2d 49 (1987), *cert. denied*, 108 S. Ct. 1013 (1988) ("the character and effect of an alleged conspiracy are determined only by analyzing the activities in question as a whole"); *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616, 625-26 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1988); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1190-91 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 828 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 327 (8th Cir.), *cert. denied*, 108 S.Ct. 1728 (1988); *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1987); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir.), *aff'd*, 472 U.S. 585, 599 & n.25, 604 (1985).

c. The court's jurisdictional error was compounded in connection with the federal statute of limitations issue by its failure to identify a controlling question of law. The court of appeals simply second-guessed the district court's determinations that factual disputes precluded entry of summary judgment. By permitting interlocutory review of factual issues, which are reviewable only on appeal from a final judgment—and even then with a very limited scope of review—the Sixth Circuit exceeded the proper limits of its jurisdiction.[16] *Cf. Donlon Industries v. Forte,* 402 F.2d 935, 937 (2d Cir. 1968) (when an issue is reviewable only on an abuse-of-discretion basis the "likelihood of reversal is too negligible to justify the

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[16] A district court's discretionary decisions, its factual determinations, and its application of settled legal standards to the particular facts of a case are not appropriately reviewable under Section 1292(b). *See Kenyatta v. Moore,* 744 F.2d 1179, 1186 (5th Cir. 1984) (interlocutory appeal of summary judgment denial not appropriate where it involves "only the application of settled principles, not important, unresolved legal issues"); *Clark-Dietz & Associates-Engineers, Inc. v. Basic Construction Co.,* 702 F.2d 67, 69 (5th Cir. 1983) ("merely fact-review questions inappropriate for § 1292(b) review"); *Link v. Mercedes-Benz of North America, Inc.,* 550 F.2d 860, 863 (3d Cir.), *cert. denied,* 431 U.S. 933 (1977) ("§ 1292(b) is not designed for review of factual matters"); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 756 (3d Cir.) *cert. denied,* 419 U.S. 885 (1974) (on § 1292(b) review, "[i]f the district court has applied the correct criteria to the facts of the case, then . . . we will ordinarily defer to its exercise of discretion"); *Johnson v. Alldredge,* 488 F.2d 820, 822 (3d Cir. 1973), *cert. denied,* 419 U.S. 882 (1974) (certified question which "comprehends factual as well as legal matters" not appropriate for § 1292(b) review); *Slade v. Shearson, Hammill & Co., Inc.,* 517 F.2d 398, 403 (2d Cir. 1974) (interlocutory review not appropriate where underlying factual issues are complex and unresolved); *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 796, 799 (D.C. Cir. 1971) (*per curiam*) (§ 1292(b) is intended for appellate courts to state controlling principles of law, not to review their application); *Control Data Corp. v. IBM,* 421 F.2d 323, 326, (8th Cir. 1970) (discretionary rulings of a trial court do not present controlling questions of law); *Chappell & Co. v. Frankel,* 367 F.2d 197, 200 n.4 (2d Cir. 1966) ("It is doubtful whether the denial of summary judgment when the applicable law is clear but there is a genuine issue as to a material fact can properly be certified under Section 1292(b)"). *Compare Brown v. Bullock,* 294 F.2d 415, 417 (2d Cir. 1961) (Friendly, J.) (*en banc*) (§ 1292(b) review is appropriate where issue has "precedential value for a large number of other suits").

delay and expense incident to an [immediate] appeal and the consequent burden on hardpressed appellate courts").

In denying respondents' motions for summary judgment, the district court held that a self-concealing conspiracy suffices to toll the statute of limitations; the court further found, as respondents have conceded (Pet. App. 58a), that even if affirmative acts of concealment are required, there is ample evidence that respondents affirmatively acted to conceal this conspiracy from petitioners and that such fraudulent concealment tolled the statutory period (*id.* at 64a, 76a). Given the district court's disposition, there was no "controlling question of law" on which an appeal might "materially advance the ultimate termination of the litigation" (28 U.S.C. 1292(b)) because the record precluded summary judgment under both the "self-concealing conspiracy" and "affirmative acts" standards for tolling the statute of limitations.[17] The court of appeals revisited the district court's findings that there were genuine issues of fact with respect to petitioners' knowledge of, and due diligence in uncovering, the conspiracy; found on an incomplete record that there were no such genuine issues; and proceeded to mandate summary judgment for respondents on that purely factual basis.[18]

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[17] There is currently pending before this Court a petition for a writ of certiorari presenting the question as to which of these standards is correct. *State of Colorado v. Western Paving Construction Co., cert. pending,* No. 87-2027 (filed June 8, 1988).

[18] With respect to the merits of the knowledge/due diligence issues, the Sixth Circuit's decision conflicts with decisions holding that in order for the defense to succeed, a plaintiff must be aware of conduct that is not merely harmful, but *actionable. See Bowen v. City of New York,* 476 U.S. 467, 480-82 (1986), *aff'g,* 742 F.2d 729, 738 (2d Cir. 1984); *Baskin v. Hawley,* 807 F.2d 1120, 1131 (2d Cir. 1986); *Richards v. Mileski,* 662 F.2d 65, 68-70 (D.C. Cir. 1981); *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 555 F.2d 687, 698 (9th Cir. 1977), *vacated and remanded on other grounds,* 437 U.S. 322, 329-30 n.12 (1978) (knowledge of defendant's "growing dominance of the market was not equivalent to notice of monopolization" under the fraudulent concealment doctrine). *Compare Philco Corp. v. RCA,* 186 F. Supp. 155, 164 (E.D. Pa. 1960).

(footnote continues)

Not only was there no "controlling" legal issue on fraudulent concealment,[19] but the court of appeals' *de novo* resolution of that issue did nothing to "materially advance the ultimate termination" of this protracted litigation. *See, e.g., Clark-Dietz & Associates v. Basic Construction Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (§ 1292(b) review must "materially advance, not retard" the litigation); *Kraus v. Board of County Road Commissioners*, 364 F.2d 919, 922 (6th Cir. 1966) (§ 1292(b) review is not appropriate where disposition in the court of appeals takes longer than disposition in the district court). When the court of appeals entered its opinion, some two and one-half years after oral argument, its wholly factual recitation of evidence on fraudulent concealment did absolutely nothing to advance the litigation because the court simultaneously held that Ohio's Valentine Act, providing that "no statute of limitations" would bar an action under state law, was *not* preempted by the federal limitations period (Pet. App. 71a-75a). Since the same facts form the basis for the state and federal causes of action, the court's foraging through the facts on fraudulent concealment was a pointless abuse of Section 1292(b) jurisdiction.

(footnote continued)

The Sixth Circuit's further holding that, as a matter of law, knowledge of *unilateral* action by individual respondents put petitioners on notice of a *conspiracy* to monopolize, fails to recognize the essential distinction in antitrust law between unilateral and joint conduct. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). The decision below also conflicts with cases holding that awareness of *joint and concerted*—not unilateral—conduct puts plaintiffs on notice of an antitrust conspiracy claim. *See King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981) *cert. denied*, 454 U.S. 1164 (1982); *Crummer Co. v. DuPont*, 255 F.2d 425, 430-33 (5th Cir.) *cert. denied*, 358 U.S. 884 (1958); *American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58, 62 (5th Cir. 1913). *Compare City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521, 524 (5th Cir. 1978) (where there was knowledge of *joint* conduct).

[19] *See In re Beef Antitrust Litigation*, 600 F.2d 1148, 1170 (5th Cir. 1979) (the issue of when the statute of limitations begins to run "is a factual one . . . not determinable on a motion for summary judgment"); *Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975) (equitable tolling presents "issues of fact" on which plaintiff's "admissions of knowledge [prior to the limitations period] will, of course, be admissible in evidence against plaintiffs at the trial, but they are not conclusive [on a motion for summary judgment]").

The court of appeals further exceeded its proper appellate role by applying an incorrect standard of review. The court recognized that "in reviewing a district court's ruling denying a summary judgment motion on grounds that a material issue of fact exists appellate review is governed by an 'abuse of discretion' standard" (Pet. App. 52a).[20] The court then expressly ignored that rule of law, acknowledging that had it applied the correct abuse of discretion standard, the proper course would have been to decline to address the statute of limitations issue on interlocutory appeal (*id.* at 70a). Instead, the court of appeals exceeded its prescribed jurisdiction under Section 1292(b) by engaging in an inquiry that involved no question of law—"controlling" or otherwise—but was wholly fact oriented.[21]

Without finding that the district court had abused its discretion, the court of appeals simply usurped the role of factfinder: "as did the district judge [we have] reviewed the evidence." Pet. App. 64a. Although concluding that the record "may contain the seeds of support for the finding of the district judge that a factual question of actual concealment was presented"—a perception that, under the correct standard of review, requires affirmance—the court of appeals simply reached a different factual conclusion (*ibid.*). But this Court has expressly stated that an appellate court is not "free to examine . . . the factual record and to draw its own conclusions." *Maine v. Taylor,* 477 U.S. 131, 145-46 n.17 (1986).

The court of appeals plainly departed from its prescribed appellate function and role by sifting through an incomplete

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[20] *Accord Nelson v. F.W. Woolworth Co.,* 788 F.2d 472, 474-75 (7th Cir. 1986); *United States v. Merchants National Bank,* 772 F.2d 1522, 1524 (11th Cir. 1985); *Johnson v. Bryant,* 671 F.2d 1276, 1279 (11th Cir. 1982); *FDIC v. Dye,* 642 F.2d 833, 835 (5th Cir. 1981); *National Screen Service Corp. v. Poster Exchange, Inc.,* 305 F.2d 647, 651 (5th Cir. 1962).

[21] "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.,* 385 U.S. 23, 25 (1966).

record on an interlocutory appeal from the denial of summary judgment. *See Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) (vacating the grant of summary judgment based on an incomplete factual record).[22] The court of appeals' departure is even more astonishing—and incorrect—because it did not even have before it the full record filed in the district court.[23] The Sixth Circuit's factfinding is particularly in-

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[22] *See also DeMarco v. United States*, 415 U.S. 449, 450 (1974) (*per curiam*) (vacating court of appeals decision that resolved a "dispositive" and "close" factual issue "based only on the materials then before the court [of appeals]" and without the benefit of an evidentiary hearing in the district court); *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 568 (8th Cir. 1977) ("an appellate court should not attempt to resolve factual issues on its own"); *Minnesota v. United States Steel Corp.*, 438 F.2d 1380, 1384 (8th Cir. 1971) (on § 1292(b) appeal, the "integrity of the appellate process would be compromised if advisory opinions were rendered on hypotheses which evaporated in the light of full factual development"); *Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 181 F.2d 341, 342 (5th Cir. 1950) (conclusions of an appellate court "should not be grounded upon an indefinite factual foundation").

[23] The court of appeals' docket sheets reflect that the record was retained in the district court pursuant to Rule 11(e), Fed. R. App. P., and was never transmitted to the court of appeals. *See* Pet. App. 319a-21a. The Sixth Circuit's entry of summary judgment, without the benefit of the very record meticulously reviewed by the district court, contravenes the express requirement in Fed. R. Civ. P. 56(c) that the entire record be reviewed in determining whether there is any genuine issue of fact to preclude summary judgment.

See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (there is no genuine issue for trial only "[w]here *the record taken as a whole* could not lead a rational trier of fact to find for the nonmoving party") (emphasis added); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (summary judgment may be granted "so long as *whatever is before the district court* demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied") (emphasis added). *See also Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (1st Cir. 1983) (the court has the "statutory task" of reviewing the pleadings, depositions, answers to interrogatories, etc. to determine whether there is a genuine issue); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981) (the court of appeals must review "the same record that the trial court used"); *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980) ("a court can only enter a summary judgment if *everything* in the record—pleadings, depositions, interrogatories,

(footnote continues)

appropriate in purporting to resolve issues of credibility without the benefit of live testimony, in any court, and without the benefit of *all* the evidence on the issue of fraudulent concealment. This Court should grant review in order to correct the court of appeals' unprecedented departure from established practice as prescribed by the decisions of this Court and of other courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(footnote continued)

affidavits, etc.—demonstrates that no genuine issue of material fact exists") (emphasis in original); *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d 653, 656 (5th Cir. 1979) (depositions in the record cannot be "ignored" by the court when ruling on summary judgment); *Williams v. Howard Johnson's, Inc.*, 323 F.2d 102, 104-05 (4th Cir. 1963); *Farley v. Abbetmeier*, 114 F.2d 569, 573 (D.C. Cir. 1940) (under Rule 56(c), "we [the court of appeals] are required to look at the pleadings as a whole, not merely at disjointed and disconnected parts thereof").